

**United States Department of Labor
Employees' Compensation Appeals Board**

T.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Palm Beach, FL, Employer**

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**Docket No. 17-0814
Issued: October 20, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 28, 2017 appellant, filed a timely appeal from a September 8, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated February 19, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On November 7, 2013 appellant, then a 51-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed cumulative trauma syndrome as a result of performing her work duties. She first became aware of her condition and realized it was causally related to her federal employment on November 23, 2010. Appellant was separated from employment on March 18, 2010 because she was unable to perform the duties of her job.³

By letter dated February 24, 2014, OWCP requested that appellant submit additional information to include a comprehensive medical report with a reasoned explanation as to how the specific employment factors contributed to her claimed injury.

The employing establishment submitted a statement dated February 18, 2004 noting that in the 23 years appellant worked for the employing establishment she was absent due to nonjob-related medical conditions for over four years. It explained that the duties appellant described on the current Form CA-2 were the same as those listed on a prior claim, OWCP File No. xxxxxx771, which had been accepted for bilateral tenosynovitis of the forearm. The employing establishment noted that appellant's last day of work was May 11, 2009.

The employing establishment submitted a March 25, 2014 statement from Rufus Graham, manager of the processing and distribution center, who noted that appellant was hired as a clerk on a multi-position letter sorting machine. Mr. Graham noted appellant's job duties and advised that, for most of her career, she had been accommodated with light-duty work for a variety of nonwork-related medical reasons and she rarely worked more than eight hours per day or 40 hours per week. He indicated that appellant was separated from the employing establishment when she could not perform the duties of her position, effective March 18, 2010.

In a decision dated April 1, 2014, OWCP denied appellant's claim because the evidence was insufficient to establish that the events occurred as described.

On April 29, 2014 appellant requested a telephonic oral hearing, which was held on December 5, 2014. She submitted a report from Dr. Bridgette S. Harrington, a Board-certified internist, dated July 19, 2013. Dr. Harrington noted that appellant's current clinical findings continued to show decreased range of motion of the right shoulder, decreased range of motion of the upper and lower extremities, and pain with movement of neck in all ranges of motion. She noted a recent cervical spine magnetic resonance imaging (MRI) scan which revealed canal narrowing, bulging disc and osteophytes, disc desiccation, and degenerative disc disease. Dr. Harrington diagnosed progressive chronic degenerative disease and opined that appellant was unable to perform, repetitive, continuous activity.

In a February 19, 2015 decision, an OWCP hearing representative affirmed the April 1, 2014 decision, as modified. He found that appellant had established that she performed duties that required physical activities. However, the claim remained denied because the medical

³ On August 28, 2007 appellant previously filed an occupational disease claim alleging that she developed cervicalgia as a result of performing her work duties, OWCP File No. xxxxxx771. OWCP accepted appellant's claim for bilateral hand and wrist tenosynovitis. This claim is not presently before the Board.

evidence of record was insufficient to establish appellant's diagnosed conditions were causally related to factors of her employment.

In a February 19, 2016 letter, received by OWCP on February 26, 2016, appellant requested reconsideration. She asserted that on February 19, 2016 she requested reconsideration *via* priority mail with the U.S. Postal Service, and that it was delivered on February 25, 2016 and signed by an OWCP representative in London, KY. Appellant indicated that she submitted 280 pages of mostly new evidence for reconsideration. She disputed Mr. Graham's contentions regarding her job duties and accommodations. Appellant indicated that her termination from the employing establishment was upheld because she had been denied access to the evidence and documents that were used against her. She asserted that the union had not adequately represented her.

With her requests, appellant submitted the following documents: an April 2, 1998 OWCP acceptance letter for a thoracic strain, OWCP File No. xxxxxxx211; a step 2 grievance appeal form dated April 5, 2000 and August 31, 2009; an Equal Employment Opportunity (EEO) complaint dated May 16, 2006; a May 29, 2008 employing establishment letter addressed to all managers and supervisors; e-mail messages dated June 13, 2008; pay, leave, or other hours adjustment requests; requests for temporary job offer/light-duty assignments dated June 23, August 16 and September 21, 2006; a report of hazard, unsafe conditions or practices form dated June 27, 2006; reasonable accommodation meeting notes dated November 28, 2006; assigned residual job offers dated January 14, 16, and 26, 2009; a May 24, 2009 notice of removal; an April 12, 2010 OWCP acceptance letter for tenosynovitis of the bilateral hand and wrist, OWCP File No. xxxxxx771; her an October 31, 2012 request for her file xxxxxx771; an e-mail to a senator dated March 13, 2014, the senator's response to her inquiry dated March 17, 2014; a step 2 grievance settlement dated April 20, 2014; her February 4, 2015 letter to an arbitrator asserting that her rights had been violated; an August 15, 2015 bargaining unit qualification standard for a mail processing clerk; a 19-page handwritten letter from her; a picture of rest bars; a request for information and documents relative to processing a grievance; a position description; joint contract interpretation manual review form; a Labor Arbitrator Award Summary; newspaper articles; an article on An Introduction to the Ergonomic Risk Reduction Process; and a tentative collective bargaining agreement.

Appellant submitted a duty status report (Form CA-17) dated January 18, 1994 from Dr. Craig Lichtblau, a Board-certified physiatrist, in which he diagnosed bilateral forearm tendinitis and advised that appellant could return to work full time with restrictions. In a form dated June 22, 1994, Dr. Lichtblau diagnosed tendinitis of the bilateral arms and noted that appellant could return to light duty on that date. On April 11, 1995 he noted that appellant had been under his care since October 28, 1992 and he had diagnosed tendinitis, over-use syndrome of the bilateral forearms, and lumbar myofascial pain syndrome. Dr. Lichtblau noted that appellant could return to light-duty work on April 11, 1995. In an attending physician's report dated July 27, 1998, he diagnosed myofascial pain syndrome and extensor tendinitis of the bilateral forearms. Dr. Lichtblau noted by checking a box marked "yes" that appellant's condition was caused or aggravated by repetitive motion and the use of rest bars. He noted that appellant could return to work on January 27, 1998 with restrictions. In a duty status report dated January 30, 1998, Dr. Lichtblau noted that appellant could return to work with restrictions and a required high straight back chair. An MRI scan of the lumbar spine dated September 9,

1999 revealed an L5-S1 foraminal disc bulge consistent with an annular tear. Appellant also submitted copies of documents previously of record.

Appellant submitted a certification, dated January 19, 1994, from Dr. Monica Walker, a Board-certified internist, who noted appellant had a long-term chronic metabolic and musculoskeletal disorder from January 5, 2000 until January 15, 2000. Dr. Walker noted that appellant could return to work on January 15, 2000 with restrictions. In a certification dated June 17, 2005, she noted having treated appellant for chronic exacerbation of a musculoskeletal and neuropathic disorder, which began on June 13, 2005 and lasted one week. Dr. Walker noted that appellant was incapacitated and would return to light-duty work on June 24, 2005. In a certification dated November 21, 2005, she noted that appellant had been incapacitated secondary to musculoskeletal disability from November 14 to 22, 2005. Dr. Walker noted that appellant could return to work with use of a high back ergonomic chair. In a December 7, 2006 certification, she found appellant totally disabled due to mechanical low back syndrome. Dr. Walker noted that appellant would be able to work with restrictions. In a certification dated February 12, 2007, she found appellant unable to function due to cervical spine, right shoulder and arm, and lumbar spine conditions, which lasted from January 22, 2007 until February 17, 2007.

By decision dated September 8, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ The Board has found that imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP must reopen the case for merit review.⁷

⁴ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System; *see* Chapter 2.1602.4b.

⁶ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also supra* note 5 at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.3(c) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹¹ As appellant's request for reconsideration was not received by OWCP until February 26, 2016, more than one year after issuance of OWCP's February 19, 2015 decision, it was untimely filed. Appellant has asserted that her February 19, 2016 reconsideration request was delivered to OWCP on February 25, 2016. However, as explained above, a reconsideration request must be received by OWCP within one year.¹² The evidence submitted does not show timely receipt. Consequently, appellant must demonstrate clear evidence of error.

The Board finds that appellant has failed to demonstrate clear evidence of error. In her reconsideration request, appellant disagreed with OWCP's decision denying her claim. She disputed Mr. Graham's statements regarding her job duties and accommodations provided by the employing establishment. Appellant indicated that her separation from the employing establishment was upheld because she had been denied access to evidence. She asserted that she was improperly terminated from her job. However, the underlying issue is whether appellant submitted sufficient medical evidence to establish her occupational disease claim. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹³ The Board notes that, while appellant addressed her disagreement with OWCP's decision denying her claim for an occupational disease, her disagreement does not demonstrate clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's most recent merit decision.

⁸ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹¹ *Supra* note 6.

¹² *Supra* note 5.

¹³ *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

Appellant submitted February 18, 2014 and a March 25, 2014 correspondence. However, OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP had committed an error in denying her claim for compensation.¹⁴ This evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus, is insufficient to discharge appellant's burden of proof.

Appellant, as noted, also submitted voluminous factual evidence regarding employing establishment personnel matters and matters pertaining to prior OWCP claims, much of which predates the present claim. This evidence is also irrelevant to the issue which was decided by OWCP and is not a basis for demonstrating clear evidence of error.¹⁵

Appellant submitted medical records from Dr. Lichtblau dated from January 18, 1994 to January 30, 1998 which reflected treatment of myofascial pain syndrome and extensor tendinitis of the bilateral forearms. Also submitted were medical records from Dr. Walker dated January 19, 1994 to February 12, 2007 reflecting treatment of appellant for cervical spine, right shoulder and arm, and musculoskeletal lumbar spine conditions. However, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision because it does not address the underlying issue in this case, whether appellant's cumulative trauma syndrome was causally related to her employment as a clerk. Rather, this evidence appears to relate to a prior compensation claim filed by appellant. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ Thus, appellant has not established clear evidence of error by OWCP in its September 8, 2016 decision.

On appeal appellant asserts that she timely submitted the request for reconsideration of the February 19, 2015 decision. As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁷ The reconsideration request was received by OWCP on February 26, 2016, more than one year after the February 19, 2015 OWCP decision. Appellant has failed to present evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹⁴ See *A.M.*, Docket No. 10-0526 (issued November 8, 2010).

¹⁵ *E.R.*, Docket No. 09-0599 (issued June 3, 2009).

¹⁶ *D.G.*, 59 ECAB 455 (2008).

¹⁷ *Supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board